



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Alleged Illegal Piers on the
Bed of Pokegama Lake, Town of Chetek, Barron
County, By Steven Hennig, Doing Business As Six
Lakes Resort

Case No.: 3-NO-99-03018

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

The Department of Natural Resources Northern Region staff conducted field investigations and allege that Steven Hennig, d/b/a Six Lakes Resort, 2535 White Street, Chetek, Wisconsin, 54728, has constructed and is maintaining oversize piers and an excessive number of piers/moorings on the bed of Pokegama Lake in the NE ¼ of the NW ¼ of Section 20, Township 33 North, Range 10 West, Town of Chetek, Barron County, Wisconsin, in violation of sec. 30.12, Stats., and Ch. NR 326, Wis. Admin. Code. It is further alleged that these structures interfere with the rights and interest of the public in Pokegama Lake.

The maintenance of said structures in Pokegama Lake, if in violation of sec. 30.12, Stats., and Ch. NR 326, Wis. Admin. Code, would be a public nuisance under sec. 30.294, Stats. It is alleged, therefore, that said actions by the above-named respondent constitute a violation of sec. 30.12, Stats., and Ch. NR 326, Wis. Admin. Code.

Pursuant to due notice hearing was held on July 18, 2000, at Barron, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The record was held open to allow for submission of an additional exhibit, which was received on July 31, 2000.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Michael Scott
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Madison, WI 53707-7921

Steven Hennig, d/b/a Six Lakes Resort, by

Attorney Don Paul Novitzke
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FINDINGS OF FACT

1. Steven Hennig, d/b/a Six Lakes Resort (Hennig or the Respondent), 2535 White Street, Chetek, Wisconsin, 54728, has constructed and is maintaining piers on the bed of Pokegama Lake at his property owned in the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 20, Township 33 North, Range 10 West, Town of Chetek, Barron County, Wisconsin. Pokegama Lake is navigable in fact at the site.

2. Hennig operates a camping resort known as Six Lakes Resort. Hennig places numerous piers every boating season for the exclusive use of campers staying at Six Lakes Resort. The Resort offers 170 campsites as well as 8 cabins. Many of these campers stay for the entire summer, and moor their boat at one of the Six Lakes' slips for the entire boating season. The Resort shoreline also provides a gas pump, and a small roped-off swimming area for use by Six Lakes Resort guests.

The Resort places five long, permanent piers, and numerous shorter seasonal piers. The five permanent piers can moor up to 22 boats each. There is also a sixth multi-slip pier capable of mooring at least eight boats. In addition, the Resort places at least 20 finger piers that moor one or two boats each. The parties agree that Hennig is maintaining approximately 144 individual boat slips on various piers located at the property described above.

The Respondent does not have a sec. 30.12, Stats., pier permit. No permit has ever been issued for any of the many piers maintained by Hennig.

3. The parties dispute the exact number of feet of riparian frontage owned by Mr. Hennig and Six Lakes Resort. A preponderance of the credible evidence indicates that the Respondent owns approximately 1,050 feet of riparian frontage. This corresponds to measurements taken by Department of Natural Resources personnel and to the air photos as measured by Department witnesses. (Exhibit #6, Revak) Further, there is no way irregularities in shoreline can account for the difference stated by the Respondent, who asserts that he owns 2,200 feet of riparian frontage. (Revak) All of the documentary evidence and the only measurements taken indicate that Hennig owns roughly 1,000 feet of frontage.

4. There is no question that numerous piers extend beyond the line of navigation. A pier extending beyond the "line of navigation" requires a permit under sec. 30.12, Stats. As set forth in NR 326.03(3), Wis. Admin. Code, the line of navigation means the three foot depth contour or a greater depth contour if required for boats in use on the waterway based on the normal summertime low level on the waterway or summer minimum levels where established by

Department order. There is no known water level set on Pokegama Lake. Accordingly, the three foot water depth contour constitutes the "line of navigation."

Sec. NR 326.04(1), Wis. Admin. Code, provides that "piers shall not extend into the shoreline beyond the line of navigation. . . unless a need can be demonstrated by the riparian" that boats using the pier require greater water depth. The only exceptions are where a pierhead line has been established, or in the case of piers associated with marinas. (Id.) The Respondent does not meet either exception, nor has he demonstrated that boats using his piers require greater water depths. (Revak)

There is no question that the existing configuration of piers requires a permit. The five longest piers measure 100 feet, 88 feet, 97 feet, 91 feet and 85 feet. The water depths at the ends of these piers is 6 feet, 5.8 feet, 6 feet, 7 feet and 9 feet, respectively. All of these permanent structures substantially exceed the three-foot line of navigation and accordingly require a permit. The recently extended pier which gave rise to the complaint, extends out into the usual area of navigation on the lake, to the 9 foot water depth. Placement of the piers beyond the line of navigation without a permit clearly violates the applicable pier standards set forth at NR 326, Wis. Admin. Code. Under these circumstances, placement of the existing piers clearly is not in conformity with sec. 30.12, Stats.

5. The 144 pier slips are maintained on five large multi-slip piers and numerous smaller finger piers that are lined up next to each other consuming nearly every available foot of riparian frontage owned by Mr. Hennig. (See: Ex. 11) The 144 boat slips grossly exceeds a reasonable use of this riparian parcel. To assist DNR water resources staff, the Department has created informal guidelines which attempt to reconcile the common law boat reasonable use doctrine with statutory limitations on a riparian owners right to the use of a navigable water. Sterlingworth Condo. Assoc. v. DNR, 205 Wis. 2d 710, 556 N.W.2d 791 (Wis. Ct. App. 1996). Even though the DNR's guidelines do not have the force and effect of law and are not controlling on the Division, the guidelines illustrate the DNR's experience and expertise in regulating piers under sec. 30.12, Stats. (Id.) Under the Department's reasonable use threshold a riparian is entitled to maintain for his use two pier slips for the first 50 feet of shoreline owned and one for each additional 50 feet of shoreline and common ownership. (Id.) DNR Water Management Specialist Mr. Revak testified that the reasonable use threshold, would allow the placement of twenty-two pier slips on this riparian frontage.

The guidance document allows for flexibility if a permit is granted. The flexibility can consider such factors as historical use, whether public access is provided and other factors described in the guidance document.

The existing placement of piers does not allow for access to the public other than to people who rent campsites at Six Lakes Resort (Hennig). Accordingly, the existing configuration of piers does not constitute a "marina" within the meaning of NR 326 or the guidance document. (Revak)

Placement of 144 individual pier slips constitutes an "unreasonable use" of this riparian parcel and violates the public interest in navigable waters. Unless riparian berths and moorings are held to reasonable limits, the near shore areas of public waterways will be largely occupied by such structures. Public use of such areas is, as a practical matter, quite difficult. Further, the public interest in boating safety, aquatic habitat, water quality and natural scenic beauty is adversely impacted by unreasonable placement of excessive numbers of pier slips.

6. The Respondent shall accordingly remove all piers which extend past the three-foot water depth until such time as the Respondent obtains a permit. The Respondent shall provide mooring to no more than 22 boats until such time as the Respondent acquires a sec. 30.12, Stats., permit.

DISCUSSION

The existing placement of piers grossly exceeds a reasonable use of this riparian parcel. The Department has demonstrated by a preponderance of the evidence that the existing piers are placed in violation of sec. 30.12, Stats., because the piers extend well past the line of navigation and have been placed in grossly excessive numbers. The ALJ provided the Respondent with an opportunity to negotiate a settlement of this matter during the course of the hearing. Indeed, even after the hearing the ALJ advised the Respondent, through his attorney, to work with the Department of Natural Resources to come up with a compromise solution. The Respondent choose not to negotiate a settlement and choose not to make application for a pier permit. Under these circumstances, the ALJ has no choice but to order removal of all piers that extend beyond the line of navigation and that exceed the reasonable use threshold. It is hoped that the Respondent will submit a pier permit request if he hopes to continue to place a larger number of pier slips during the next boating season. If a pier permit application is received, the Division of Hearings and Appeals will make every effort to put the hearing on its calendar as soon as practicable.

The navigable waters of the State are held in public trust. Accordingly, a pier permit requires a published public notice to members of the public. Sec. 30.12(2) and 30.02(3) and (4), Stats. It would not be fair to members of the public, nor to other riparians who have gone through the permitting process, to allow Hennig to place piers beyond the line of navigation or in numbers exceeding the reasonable use threshold without a permit. Some configuration of piers has been in existence for many years. Accordingly, the Respondent may be eligible for a permit authorizing placement of slips above the reasonable use threshold. Mr. Revak of DNR opined that placement of slips accommodating up to 90 boats may be appropriate. However, because several of the piers have been recently extended, it is difficult to determine what the "historic use" of the site for pier placement has been.

Consideration of this issue should include input from members of the public, or at least the opportunity for such input in the form of published public notice. Accordingly, this Order restricts placement of piers beyond the line of navigation and/or in excess of the reasonable use threshold until the applicant obtains a 30.12, Stats., permit.

CONCLUSIONS OF LAW

1. Pursuant to secs. 30.03(4)(a) and 227.43(1)(b), Stats., the Division of Hearings and Appeals has the authority to issue the following order.
2. Steven Hennig, d/b/a Six Lakes Resort, is a riparian owner within the meaning of sec. 30.12, Stats.
3. The existing Steven Hennig, d/b/a Six Lakes Resort piers described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.
4. Pursuant to sec. 30.12, Stats., and sec. NR 326.04(1), Wis. Admin. Code, a permit is required for the existing Steven Hennig, d/b/a Six Lakes Resort piers. The piers were constructed and maintained without a permit. Accordingly, the construction and maintenance of these piers constitutes a violation of secs. 30.12 and 30.15(1)(d), Stats.
5. The existing Steven Hennig, d/b/a Six Lakes Resort piers constitute an impairment to navigation and is "detrimental to the public interest in navigable waters" within the meaning of sec. 30.12(2), Stats., because it constitutes an excessive intrusion into a public waterway for a private purpose. Five piers extend beyond the "line of navigation." Further, placement of the above described structures exceeds a "reasonable use" of this riparian parcel.
6. The DNR has drafted a guide to provide staff with direction in determining when piers have an impact on public waterways. The guide incorporates the common law presumption that berthing and mooring privileges generally accrue in proportion to the amount of shoreline owned. The guide sets a presumption of "reasonable use" at two spaces at a pier for the first fifty feet or lesser amount of shoreline under common ownership. However, DNR employees are to consider whether other statutory criteria, i.e., sec. 30.13(1)(a) or other public interest factors, i.e., critical habitat, would impose greater restrictions on construction and placement before applying this formula. Sterlingworth Condo. Assoc. v. DNR, 205 Wis. 2d 710, 732, 556 N.W.2d 791 (Wis. Ct. App. 1996). The existing configuration grossly exceeds the "reasonable use" of this parcel and is detrimental to the public interest in public waters.
7. The construction and maintenance of the existing Steven Hennig, d/b/a Six Lakes Resort piers in violation of secs. 30.12 and 30.15, Stats., constitutes a public nuisance pursuant to sec. 30.294, Stats. This violation is abated if Steven Hennig, d/b/a Six Lakes Resort removes the existing pier within the time limit set in the following order and the Steven Hennig, d/b/a Six Lakes Resort places a pier in accordance with the conditions set forth below.
8. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

WHEREFORE IT IS HEREBY ORDERED that beginning in the May, 2001 boating season, the Respondent, Steven Hennig, d/b/a Six Lakes Resort, shall place no more than 22 boat slips and shall place no pier structures that extend past the three foot water depth contour, unless he obtains a sec. 30.12, Stats., permit after a published public notice.

Dated at Madison, Wisconsin on August 31, 2000.

STATE OF WISCONSIN
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By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.